Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, N.W.
Washington, D.C. 20551

Re: **Regulation E; Docket No. R-1210**

Dear Ms. Johnson:

The Consumer Bankers Association[1] (CBA) appreciates the opportunity to submit these comments on the Board's proposed revisions to Regulation E and its Official Staff Commentary. Our members are engaged in all aspects of developments with respect to electronic payment systems and services, and are therefore vitally concerned that the customer protection rules in Regulation E evolve in a balanced manner that does not burden the industry with undue costs or rigidity, and does not inhibit product design and marketing. It is especially important at a time of rapid growth of electronic transfer and payment systems, with little if any evidence of consumer risk or injury, that the law not lock in restrictive rules that prevent or deter healthy developments in the marketplace.

I. Electronic check conversion

CBA generally supports the proposals for dealing with electronic check conversions, insofar as they are recognized as subject to Regulation E, but with these qualifications:

1. Payees should have the flexibility to obtain an authorization that allows the item to be processed either as an EFT or as a check. There may be a variety of reasons why a payee would use the "ECK" process in some instances, but prefer to process the customer's check through normal collection channels in others. Electronic system interruption is but one example. No one quite knows what the impact of Check 21 will be on the check collection process, and it is possible that check collection systems will come to parallel EFTs in speed and efficiency, or even subsume them. The proposed required disclosure that, in an ECK, funds may be debited from the

[1] The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

consumer's account quickly, alerts the consumer to the potential lack of float, and the consumer is hardly prejudiced if the check is actually forwarded physically in the conventional manner.

2. We urge the Board not to require separate written authorizations for POS conversions. Reinforced with proper disclosure, the consumer's tender of the paper check implicitly acknowledges the obligation and authorizes the draw of that amount from the customer's account. The customer has signed the check, ordering the drawee bank to pay "on demand." Requiring the formality of an additional written authorization would add another administrative processing step, with resulting costs of implementation and monitoring, for no quantifiable gain. It would also treat POS transactions differently from "ARC" transactions, for no apparent reason.

3. We agree that an institution's initial disclosures under Regulation E should include ECKs as a new form of funds transfer service. Since this will require re-design and printing of new forms, we urge the Board to allow ample lead time for that adjustment. We would suggest at least twelve months. The Board ought also make it clear that the introduction of ECK services does not require change in terms notices to existing customers, since none of the terms of the underlying account agreement are affected by this new type of transfer.

4. The current Regulation E and Commentary, as well as the proposed revisions, treat ECKs as "one-time EFTs." This means there must be disclosure and authorization for each payment event or billing cycle. We suggest that it may be appropriate in some circumstances to allow a payee, such as a credit card issuer, to contract with its cardholders for regular electronic conversion of the customer's payment check each month, and that a single, on-going authorization could be sufficient for this purpose. We understand that that possibility is not explicitly in play in this rule-making, and remains an issue for another day.

5. We believe the Board should clarify its understanding of what happens if a payee fails to give the proper disclosure or otherwise fails to get the consumer's proper authorization for an ECK. The implication from the existing and proposed Regulation and Commentary is that an unauthorized ECK is not considered an EFT transaction, and remains subject to the law of checks. A clarification on this point would help payees determine how to unwind or otherwise adjust an attempted ECK transfer to the check environment, including Check 21.

II. Payroll cards

In general CBA supports coverage of payroll cards under Regulation E. Our most serious observation is that the Board should make absolutely clear that its treatment of payroll cards is limited to that product, as defined, and is not transferrable to other kinds of stored-value products. The emergence of various kinds of stored value cards is too new, and their financial viability too fragile, to encumber them with extensive regulatory restraints at this time. In addition:

1. We do not believe coverage of payroll card accounts should be tied to coverage by federal deposit insurance. The concern of Regulation E is disclosure and consumer protection,

not insurance on deposits. The structures of payroll card accounts are still evolving, and perfectly acceptable arrangements may be designed without implicating FDIC coverage. It would be unfortunate if consumers in such arrangements did not enjoy the baseline protections of Regulation E.

2. Under the Board's proposal, payroll card accounts would be subject to all the disclosure and other protective rules of Regulation E. We urge the Board to consider whether the institutions offering payroll card programs could be excused from the periodic statement requirements of Regulation E at this time. Payroll cards are new products, whose range of uses are still evolving. The needs and expectations on consumers provided payroll cards are unmeasured and untested, and we are unaware of any evidence that such cardholders lack adequate information about the status of the account and their uses of it. The initiation of full-blown Regulation E periodic statements is a costly and complicated endeavor for the employers or other institutions that manage payroll card accounts, and the operational costs and compliance risks associated with periodic statements could be a significant disincentive to develop those programs. We urge that application of the periodic statement rules of Regulation E to payroll card accounts be held in abeyance until there has been adequate time to assess the need for that disclosure structure.

3. For payroll card arrangements to function as "accounts" under Regulation E, it seems necessary for the Board to waive or exempt those accounts from § 913(2) of the Electronic Fund Transfer Act (Compulsory use of electronic fund transfers). Otherwise employers could not initiate payroll card plans except on a voluntary basis – defeating the purpose of implementing a more efficient, lower cost payroll system.

III. Preauthorized transfers

CBA generally concurs in the proposed Commentary revisions affecting Section 205.10. We strongly support the proposed withdrawal of existing Commentary that says that a recorded phone authorization is not adequate authorization for pre-authorized EFTs. That issue should be resolved under E-Sign, for consistency with the broader coverage and objectives of that law.

IV. Issuance of access devices; Error resolution

CBA supports the proposed Commentary revision concerning additional access devices [comment 5(b)-5], which will now parallel that in Regulation Z for credit cards. We also concur in the revision concerning dispute investigation [comment 11(c)(4)-5], so long as it is understood that a financial institution satisfies its obligation to search its own records by making a reasonable search or sweep even if particular information is not retrieved in that process.

V. Disclosures at ATMs

CBA strongly supports the proposed revision to Commentary ¶ 16(b)(1)-1 to clarify that

fee disclosures via signage at ATMs are sufficient if they indicate that a fee may be imposed, rather than will be imposed. There are numerous circumstances where an ATM proprietor may generally or sometimes impose fees for ATM transactions, but may not impose a fee for certain kinds of transactions, or for certain customers. For example, an ATM operator may choose not to impose fees for cardholders whose cards are issued by that operator or a corporate affiliate, or where there are special contractual relationships between the operator and the card issuer. It would be positively misleading for the ATM signage to indicate that fees would accompany every transaction at the ATM, when in fact that would not be the case. Thus a disclosure that fees "may" be imposed is not only more accurate, but may prompt the concerned consumer to pay greater attention when a specific fee appears on the screen and the consumer may elect to discontinue the transaction without incurring the fee. There is no justification in disclosure theory for a disclosure (that a fee will be imposed) that is accurate only some of the time, and false the rest of the time.

Thank you for your consideration of these comments. If you have any questions, please contact Marcia Sullivan, Director of Government Relations, at (703) 276-3873, or Steven Zeisel, Senior Counsel, at (703) 276-3873.

Sincerely,

Ralph Rohner

Special Counsel